Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

GINA SHAW,

Petitioner,

v.

JAMES K. HAHN, JOHN EMERSON, JAMES PEARSON, THOMAS HOKINSON, CORY BRENTE, CITY OF LOS ANGELES, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a female, African American venire person exercise personally her first-party right under the equal protection clause of the Fourteenth Amendment not to be excluded from a jury, based on her claim that she was excluded from a jury on account of impermissible, discriminatory reasons, by bringing an action under 42 U.S.C. 1983 against the attorneys who peremptorily removed her from the jury?

2. Does the conferring of third party standing on parties to actions in which it is contended that a venire person is sought to be peremptorily challenged based on reasons that are impermissible under the Equal Protection Clause operate, by way of collateral estoppel, to strip first-party standing from the venire person who is challenged, and who then brings a first-party action to redress the alleged violation of her right to equal protection?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Gina Shaw, a female, African American venire person in the federal courts, petitions for a writ of certiorari to review the judgment of the United States Court of appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion below of the Court of Appeals (App.A, 1a-10a) was rendered on June 6, 1995, and is reported at 56 F.3d 1128. The district court order of dismissal is at Appendix B, 1b.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1995, F.R. App. P. (West 1995) Rule 36, and this Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides as follows:

> nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

Petitioner Gina Shaw is a female, African American who was called to jury duty in the United States District Court for the Central District of California in September 1993. She was directed to the courtroom of United States District Judge Stephen V. Wilson, and there at random was selected as one of the prospective jurors to sit in the jury box and to be subjected to the court's *voir dire.*

Upon the completion of *voir dire,* defense counsel in that case, Respondents herein, stated their peremptory challenge to Petitioner remaining on the jury.

Plaintiff in that case objected to the exercise of the peremptory challenge and, unbeknownst to Petitioner, a side-bar conference was held by Judge Wilson in order to

consider and to determine the objection to the exercise of the peremptory challenge against Petitioner.

At that side-bar conference, which lasted two minutes, Judge Wilson, again unbeknownst to Petitioner, overruled the objection to the challenge to Petitioner as a juror, and Judge Wilson then excused Petitioner from the jury.

Thereafter, Petitioner filed an action against Respondents under 42 U.S.C. 1983, and alleged that her right to equal protection had been violated by Respondents removing her from the jury for impermissible reasons based on her gender and on her ethnicity.

The district court dismissed the action on the ground that the plaintiff in the action from which Petitioner was peremptorily removed as a juror had exercised his vicarious standing to object to the use of the peremptory challenge against Petitioner, and that therefore, Petitioner herself was barred by the doctrine of collateral estoppel from pursuing her Section 1983 action.

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit, and it upheld the district court's dismissal, basing its affirmance on the same ground: collateral estoppel.

It is Petitioner's contention that this Court's conferral of vicarious standing on parties litigant to object to the exercise of a peremptory challenge to a venire person may neither supplant, foreclose, nor make nugatory the right of the venire person to exercise her first party standing to redress her right not to be excluded from a jury in violation of the Equal Protection Clause; and that

the judicially-created doctrine of collateral estoppel may not properly be utilized to strip standing on a constitutional claim from a party with standing, and who has no connection whatever with a party on whose action collateral estoppel is based.

Petitioner claims that Respondents' reasons for exercising their peremptory challenge against her as a potential petit juror were based on her status as an African American, and that Respondents' reasons given for their exercise of their peremptory challenge against her were pretextual. Her proof of those material facts would sustain her claim that she was denied equal protection of the law.

Courts agree that an individual who has been subjected to racial discrimination may recover damages for the actual injuries suffered. *See, e.g., Flores v. Pierce,* 617 F.2d 1386, 1392 (9th Cir.) (opinion by then Judge Anthony M. Kennedy), *cert. denied,* 449 U.S. 875 (1980). Indeed, substantial damages may be awarded absent any proof of actual injury in dignitary tort cases. *See, e.g., Herrera v. Valentine,* 653 F.2d 1220, 1229-30 (8th Cir. 1981) (quoting D. Dobbs, Remedies [1973]). *See also, Curtis v. Loether,* 415 U.S. 189, 196 n. 10 (1974) ("it has been suggested that 'racial discrimination might be treated as a dignitary tort.' ") Thus, had Petitioner been permitted to prove that the action taken against her was based on her race, she would have been entitled to damages.

In *Batson v. Kentucky,* 476 U.S. 79 (1986), it was held that racial discrimination in the form of excluding members of a criminal defendant's race from sitting on a jury was unconstitutional. *Edmonson v. Leesville Concrete Co.,* 111 S.Ct. 2077 (1991), extended the *Batson* rule to civil

cases, and *Hernandez v. New York*, 111 S.Ct. 1859, 1865-66 (1991), included Latinos as a class subject to the *Batson/ Edmonson* principles.

Powers v. Ohio, 111 S.Ct. 1364, 1370 (1991), provided that "[a]n individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."

Courts have established a number of principles to be applied in examining the use of peremptory challenges. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), it was held that uses of peremptory challenges are subject to close scrutiny.

It is clear that the right involved is the right to equal protection, and that *the right is held by the juror who is excluded. Powers, supra; see also, In re Gault*, 387 U.S. 1, 19-20 (1967) (all constitutional rights are individual, and not group, rights).

Several other principles are important to analysis of the issue of exclusion of jurors based on improper motives. First, such exclusion is abhorrent because it "casts doubt on the integrity of the judicial process." *Rose v. Mitchell*, 443 U.S. 545, 556 (1979).

Second, "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts. . . . " *Powers*, 111 S.Ct. at 1372.

Third, "individual jurors subjected to racial exclusion have the legal right to bring suit on *their own behalf* [,]" *id.* at 1373 (emphasis added), but, since "[t]he barriers to a

suit by an excluded juror are daunting [,]" *id.* at 1374, fourth, there is vicarious standing to parties to suits in which peremptory challenges improperly are exercised to object to the challenges. *Ibid.*

Yet, the conferring of vicarious standing on parties to suits to challenge uses of peremptory challenges, may not be used to deprive the individual juror who has been challenged from pursuing the improper use of the peremptory challenge against him or her, himself or herself. *Id.* at 1370; *see also, Carter v. Jury Comm'n of Greene County,* 396 U.S. 320, 329-30 (1970). Though such first-party, juror challenges are rare, *see* Alschuler, "The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts," 56 U. Chi. L. Rev. 153, 193-95 (1989), they are permitted.

REASONS FOR GRANTING THE PETITION

1. The court below has decided an issue in a manner that is contrary to controlling Supreme Court precedent, and so that a fundamental right under the Constitution and a rule of standing set forth by this Court have been nullified: the right of a venire person to sue in federal court for violation of her right to equal protection.

2. A judicially-created doctrine of efficiency – collateral estoppel – was used to nullify a right to redress and a right to standing.

3. The court below has created the anomaly that a party with standing to sue to redress a constitutional

deprivation never will be able to have standing to redress that deprivation.

I

BECAUSE THE OPINION BELOW STRIPS FEDERAL VENIRE PERSONS OF THEIR CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF LAW AND DEPRIVES THEM OF STANDING TO SUE TO ENFORCE THAT RIGHT, IN CLEAR VIOLATION OF THIS COURT'S PRECEDENTS, CERTIORARI SHOULD BE GRANTED.

There is no question but that persons called to serve on petit juries in the federal courts individually have the constitutional right not to be excluded from a jury based on race. *Powers,* 111 S.Ct. at 1370. "An individual juror . . . does possess the right not to be excluded from [a jury] on account of race." That a right is individual to a venire person and is not a so-called collective right. *In re Gault,* 387 U.S. at 19-20.

An individual venire person has standing to sue to vindicate the violation of the right. *Powers,* 111 S.Ct. at 1370; *see also, Carter,* 396 U.S. at 329-30.

In this case, the court below made impossible the exercise of that right to equal protection of law by holding that a venire person who claims she has been excluded from a jury based on her race is without standing to sue to vindicate that right, and that holding is in clear violation of this Court's precedents.

For this reason, certiorari should be granted.

II

BECAUSE THE JUDICIALLY-CREATED DOCTRINE OF COLLATERAL ESTOPPEL WAS ELEVATED ABOVE BOTH THE CONSTITUTION AND THIS COURT'S RULE OF STANDING, CERTIORARI SHOULD BE GRANTED.

In this case, a judge-made rule of expediency – collateral estoppel – wrongly was used to overrule both the Seventh Amendment right to trial by jury of constitutional claims and this Court's precedents.

The district court ruled, and the court below affirmed, that when a party to an action who has vicarious standing to object to the alleged improper use of a peremptory challenge against a venire person exercises his standing to attempt to prevent the exercise of the peremptory challenge, the venire person to whom the challenge was addressed thereby is stripped of her first-party standing to sue to redress her own right.

While use of collateral estoppel in some other instances certainly is efficient, economical, proper, and warranted, its use here is both perverse and ill-advised.

First, the court below erred in its interpretation of collateral estoppel, and second, it denied Petitioner her Seventh Amendment right to trial by jury of her *own* claim.

Before collateral estoppel may be applied, the issues in the two cases must be identical. *Shaply v. Nevada Bd. of State Prison Commissioners*, 766 F.2d 404 (9th Cir. 1985). The issue on which preclusion is sought in the second action must have been both critical and necessary to the

judgment in the first action, and it must have been actually decided after a *full and fair opportunity* to have been litigated. *Town of North Bonneville v. Calloway*, 10 F.3d 1505, 1508 (9th Cir. 1993); *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). Here, the Judge's ruling on the *Batson* objection in the first action was neither critical nor necessary to the judgment in the first action. Also, there was neither a full nor a fair opportunity to litigate the issue in the first action: the opportunity was both truncated and summary. For collateral estoppel to be applied against one not a party to the first action, her interests must have been so similar to the party in the first action so that the party in the first action can be said to have been the "virtual representative" of the party in the second action. *United States v. Geophysical Corp.*, 732 F.2d 693, 697 (9th Cir. 1984). Indeed, when the second case may involve a different damages amount than the first case did, then collateral estoppel in *in*appropriate. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1284 (9th Cir. 1986). Here, the interest in the first action to have a fair jury is completely different than the interest in the second action to recovery damages for a constitutional deprivation.

Application here of collateral estoppel prevents a party from vindicating a liberty interest that actually belongs to her.

This Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332 (1979), forecloses the use of collateral estoppel in this case because there were procedural opportunities available to Petitioner in this case that were *un*available to plaintiff in the case from whose jury Petitioner was peremptorily removed by Respondents.

Because of this Court's " 'requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard[,]' " *id.* at 328 (citation omitted), collateral estoppel improperly was applied in this case.

Hardly did Petitioner's dubbed virtual representative in the prior action, the plaintiff therein, have a full and fair opportunity to litigate the issue of the removal of Petitioner from the jury in the underlying case while momentarily standing at side-bar. The holding of the court below that the two-minute encounter at side-bar with no discovery, no development of issues, no framing of issues, no opportunity to prepare, no pre-trial proceedings, and the summary disposition of the issue by the judge without a jury, is seriously wrong. Indeed, it was held that a mere side-bar conference constituted full and fair litigation of an important and serious constitutional claim. Apart from the facts that there was no discovery, no witnesses called or sworn, and no evidence taken, the opinion of the court below trivializes to the point of non-existence and oblivion a right this Court found to be had by federal venire persons.

At a minimum, discovery and evidence are the least of the procedural opportunities that must have been afforded for collateral estoppel to have been applied offensively, as here. In *Parklane*, it is noted that a predicate for collateral estoppel is "every opportunity to present evidence and [to] call witnesses." 439 U.S. at 332 n. 18. *See also, Mack*, 798 F.2d at 1283-84 (collateral estoppel disallowed because first proceeding did not include presentation of evidence).

Therefore, the finding that Petitioner's right was fully and fairly litigated by the plaintiff in the first action, because that plaintiff had an interest in preserving *his* claim and was accorded the opportunity at side-bar, such as it was, to press his claim, in wrong.

Application of offensive collateral estoppel here runs counter to the principle that "[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary." *Parklane,* 439 U.S. at 343 (Rehnquist, J., dissenting). Allowing a court-created doctrine of collateral estoppel to foreclose Petitioner from pursuing her personal claim that she was peremptorily removed from a petit jury by the government based on impermissible racial grounds is contrary to this Court's jurisprudence and precedents.

The finding of the court below that there was a full and fair opportunity for litigation of Petitioner's equal protection claim at the mere side-bar in the underlying case is egregiously wrong because it flies in the face of this Court's pronouncement that " 'the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most important safeguard [in determining the propriety of the application of collateral estoppel].' " *Parklane,* 439 U.S. at 328 (citation omitted). Here, collateral estoppel improperly was used to nullify both a constitutional right and standing to assert that right. Indeed, an identity of procedural opportunities in both actions is a prerequisite to application of collateral estoppel. *Id.* at 332. Since here

there was no such identity of procedural opportunities, there can be no collateral estoppel.

Thus, because the finding of the court below that there was a full and fair opportunity to have litigated Petitioner's right in the first trial was egregiously wrong, certiorari should be granted.

III

THE BIZARRE ANOMALY CREATED BY THE COURT BELOW – THAT A PARTY UNDER NO CIRCUMSTANCES EVER WOULD BE ABLE TO HAVE STANDING TO PURSUE VINDICATION OF A CONSTITUTIONAL RIGHT – WARRANTS GRANTING OF CERTIORARI.

Without extension or any carrying further at all, the opinion of the court below creates a bizarre anomaly that makes impossible exercise of the right of a venire person, established by this Court, who has been subjected to a denial of her right to equal protection. Under no imaginable circumstances could a venire person subjected to an improper, race-based peremptory challenge ever have standing to redress the violation of that right under the opinion of the court below.

The opinion of the court below effectively takes away from all venire persons their personal right to equal protection.

1. If a judge sustains a party's objection to a peremptory challenge, based on *Batson* grounds, there is no rights violation, and thus no basis to assert an equal protection claim.

2. If a judge overrules an objection to a peremptory challenge then, under the opinion of the court below, collateral estoppel operates to bar the venire person's claim and standing.

3. If the party in the first action makes no objection to the exercise of the peremptory challenge, but could have made such an objection, then, because the matter could have been but was not litigated, collateral estoppel bars its relitigation.

4. Because the venire person has no control over whether or not the party to the underlying litigation appeals an overruling of a *Batson* objection to the use of a peremptory challenge, there can be no full and fair litigation of the equal protection claim. If the party to the underlying case prevails, then there can be no appeal at all.

This universe of possibilities, coupled with the opinion of the court below, makes impossible under all circumstances any exercise, ever, of a venire person's right to exercise her equal protection claim as defined, and for which she has been given standing, by this Court. This anomaly, nullifying a constitutional right, warrants the granting of certiorari.

IV

CONCLUSION

Because venire persons in the federal courts have a right under the Equal Protection Clause of the Constitution not to be peremptorily excluded from juries based on

race; because they have first-party standing to sue to redress and to vindicate a violation of that right; because the opinion of the court below effectively nullifies that right in all circumstances so that no one ever will be able to have first-party standing to pursue the vindication of that right, this Court should grant certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GINA SHAW, *Plaintiff-Appellant,* v. JAMES K. HAHN; JOHN EMERSON; JAMES PEARSON; THOMAS HOKINSON, et al., *Defendants-Appellees.*	No. 94-55472 D.C. No. CV-93-7064-JSL OPINION

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued* and Submitted
May 1, 1995 – Pasadena, California

Filed June 6, 1995

Before: Betty B. Fletcher, Melvin Brunetti,
and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Fletcher

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* Counsel for the parties appeared. Appellant's counsel waived opening argument. Appellees' counsel then waived argument and the court submitted the case without argument.

OPINION

FLETCHER, Circuit Judge:

Gina Shaw appeals the district court's dismissal of her civil rights action against the City of Los Angeles and former and current members of the Los Angeles City Attorney's Office. Shaw, who is African-American, claims that the defendants violated her equal protection rights by exercising a peremptory challenge to remove her from a venire panel on the basis of her race. We have jurisdiction and affirm.

I

In September of 1993, Shaw was called for jury duty and was among the jurors subjected to voir dire in the case of *Tapia v. Gates*. *Tapia* involved claims against the City of Los Angeles and various city officials by Raymond Tapia and Jason Corona, who alleged that an off-duty police officer had violated their constitutional rights by shooting them during a physical altercation. The defendants in the *Tapia* action were represented by the City Attorney's Office. During jury selection, Deputy City Attorney Cory Brente exercised a peremptory challenge against Shaw. Tapia and Corona objected to the challenge, alleging that it was based on race and therefore violated *Batson v. Kentucky*, 476 U.S. 79 (1986). After a sidebar, District Court Judge Stephen Wilson permitted the peremptory challenge and excused Shaw from the jury.

Judge Wilson subsequently explained his basis for rejecting Tapia's and Corona's *Batson* objection:

> (1) The Court noted that the challenged juror had responded suspiciously slowly and in a somewhat hostile manner when individually questioned by the Court during jury selection;
>
> (2) At sidebar, defendant[s'] counsel informed the Court that, during questioning of the whole venire panel, defendant[s'] counsel had noticed body language of the challenged juror indicating hostility to defendant[s'] position. The Court had not observed the same body language, but defense counsel's observations were consistent with the Court's separate observations, and the Court had no reason to doubt the veracity of defendant[s'] counsel.

Order Regarding *Batson* Claim and Request for Adverse Inference, *Tapia v. Gates*, No. CV-91-6735-SVW (C.D. Cal. Nov. 1, 1993).[1] Noting that Brente had not challenged another African-American juror, Judge Wilson rejected the plaintiffs' *Batson* challenge.

Two months after she was excused from the venire panel in *Tapia*, Shaw sued Brente, the City of Los Angeles, and various former and current employees of the Los Angeles City Attorney's Office under 42 U.S.C. §§ 1983, 1985, and 1986, alleging that the defendants violated her

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[1] We take judicial notice of Judge Wilson's order. In deciding whether to dismiss a claim under Fed. R. Civ. P. 12(b)(6), a court may look beyond the plaintiff's complaint to matters of public record. *Mack v. South Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (district court's consideration of state administrative records to determine whether an agency decision had a collateral estoppel effect on the plaintiff's claim did not convert defendant's 12(b)(6) motion to one for summary judgment).

equal protection rights by excluding her from the jury on the basis of her race. The defendants moved under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss for failure to state a claim upon which relief could be granted. The district court granted the defendants' motions to dismiss, and Shaw filed a timely notice of appeal.

II

We accept the premise that Shaw has an equal protection right not to be excluded from a jury solely on the basis of her race. When the Supreme Court held in *Batson*, 476 U.S. at 84-100, that the use of a peremptory challenge in a criminal trial to exclude a venireperson from the jury solely on the basis of his or her race violated the Equal Protection Clause, the Court explained that the practice violated not only the equal protection rights of the criminal defendant by denying him the protection that a jury trial is intended to secure, *id.* at 85-86, but also the equal protection rights of the excluded juror, *id.* at 87-88.

In *Batson's* progeny, the Supreme Court has made clear that the prohibition against racially discriminatory peremptory challenges is bottomed primarily in the equal protection rights of the potential juror, not the rights of the litigant. *See generally* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it, Anyway?*, 92 Col. L. Rev. 725, 742-50 (1992) (arguing that the primary doctrinal foundation for *Batson* and its progeny is that raced-based jury selection violates the equal protection rights of excluded venirepersons). For example, in *Powers v. Ohio*, 499 U.S. 400, 404-16 (1991), the

Court held that a criminal defendant could object to an allegedly discriminatory use of a peremptory challenge, even if the defendant did not share the challenged juror's race. In response to the state's argument that a white defendant could not object to the exclusion of black venirepersons, the Court explained that its decision in *Batson* "was designed to serve multiple ends, only one of which was to protect individual defendants from discrimination in the selection of jurors." *Id.* at 406 (quotations omitted). Emphasizing the importance of an individual's right not to be excluded from a jury on account of race, *id.* at 406-09, the Court stated explicitly that an excluded venireperson has a legal right to bring suit on his or her own behalf, but recognized that the "daunting" barriers to such a suit hindered the venireperson's ability to assert his or her own constitutional rights.[2] *Id.* at 414. Applying the three-prong test to determine third party standing, *see Singleton v. Wulff*, 428 U.S. 106, 112-16 (1976),[3] the Court

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[2] The Court had long recognized that individual jurors were unlikely to pursue on their own behalf the available remedies against race-based jury selection. *See Vasquez v. Hillery*, 474 U.S. 254, 262 n.5 (1986) (noting that, "in theory," section 1983 "allows redress for blacks who have been excluded from grand jury service," but that such suits were rare and therefore an ineffective remedy for discrimination); *Rose v. Mitchell*, 443 U.S. 545, 558 (1979) (recognizing that "expensive to maintain and lengthy" civil actions "have not often been used" to vindicate the rights of minorities to serve on grand juries).

[3] A litigant may assert the legal rights or interests of third parties only when (1) the litigant has suffered an injury in fact, giving him a concrete interest in the outcome of the disputed issue; (2) the litigant has a close relationship to the third party; and (3) the third party's ability to protect his own interests in hindered. *Singleton*, 428 U.S. at 112-16.

concluded that a criminal defendant, regardless of his or her race, has standing to raise the excluded venireperson's equal protection rights and object to a race-based peremptory challenge. *Powers*, 499 U.S. at 410-416.

Two months later, in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Court held that the prohibition against racially discriminatory peremptory challenges applied to jury selection in civil cases as well as criminal cases. *Id.* at 618-31. In doing so, the Court echoed the logic of *Powell*, holding that private litigants in civil trials have third-party standing to raise the equal protection claims of venireperson excluded on account of race. *Id.* at 628-31 ("Our conclusion in *Powers* that persons excluded from jury service will be unable to protect their own rights applies with equal force in a civil trial.").

III

Thus, it is axiomatic that Shaw has a right not to be excluded from a jury solely on the basis of her race and that she can bring a claim alleging that a civil litigant has violated that right. *See, e.g., Carter v. Jury Comm'n of Greene County*, 396 U.S. 320, 329-30 (1970) (individuals excluded from jury service on the basis of their race may bring suit on their own behalf). Indeed, the defendants do not seriously dispute that the right violated by raced-based jury selection is the excluded venireperson's. Rather, the defendants argue that Judge Wilson's determination during the *Tapia* trial that the defendants based their peremptory challenge on neutral, nondiscriminatory reasons should be given preclusive effect in this action. We agree.

The doctrine of issue preclusion prevents relitigation of issues actually litigated and necessarily decided, after a full and fair opportunity for litigation, in a prior proceeding. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). Judge Wilson necessarily decided as part of the *Tapia* action whether the defendants' peremptory challenge against Shaw was racially discriminatory. He held it was not. We turn then to whether the issue was fully and fairly litigated by the parties in the *Tapia* action.[4] Tapia and Corona promptly objected to the peremptory challenge against Shaw on the grounds that the challenge was racially discriminatory. As *Batson* prescribes, Judge Wilson required the defendants to articulate a neutral basis for the challenge. After considering the defendants' proffered reasons, Judge Wilson concluded that they were neutral, nonpretextual, and comported with his own observations.

Nonetheless, Shaw asserts she should not be bound by Judge Wilson's ruling. The doctrine of issue preclusion, of course, cannot be applied against a litigant who was not a party to or in privity with a party to the prior proceeding. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *Blonder-Tongue Lab., Inc. v. University of Illinois Found.*, 402 U.S. 313, 329 (1971). "[W]hen two

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[4] The plaintiffs' excessive force claims in *Tapia* eventually were rejected on the merits, and, although Tapia and Corona appealed Judge Wilson's entry of judgment against them, *see Tapia v. Gates*, No. 94-56658 (9th Cir. 1995), they did not appeal his *Batson* determination. The *Tapia* plaintiffs' failure to appeal does not prevent us from holding that the issue was fully and fairly litigated for purposes of applying issue preclusion. *Ayers. v. Richmond*, 895 F.2d 1267, 1271 (9th Cir. 1990).

parties are so closely aligned in interest that one is the virtual representative of the other, a claim by or against one will serve to bar the same claim by or against the other." *Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1405 (9th Cir. 1993); *accord United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980); *see also In re Gottheiner*, 703 F.2d 1136, 1140 (9th Cir. 1983) ("Privity exists when there is 'substantial identity' between parties, that is, when there is sufficient commonality of interest.").

We conclude that the identity of interests between Shaw and the *Tapia* plaintiffs, and the adequacy of the *Tapia* plaintiffs' representation of her equal protection interests, were such that they were in privity. *See Powers*, 499 U.S. at 410-16. In *Powers*, the Supreme Court, holding that a white criminal defendant shares a sufficiently close relationship with a black venireperson to enjoy standing to assert the venireperson's equal protection rights, concluded that

> *the excluded juror and the criminal defendant have a common interest in eliminating racial discrimination from the courtroom.* A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. *This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror. And, there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons' rights.*

Id. at 413-14 (emphasis added). In *Edmonson*, the Court noted that "the relation between the excluded venireperson and the litigant challenging the exclusion [is] just as close in the civil context as in the criminal trial." 500 U.S. at 629. A litigant raising a *Batson* objection acts shares a sufficient commonality of interest with the venireperson to act as her "virtual representative" for purposes of litigating her equal protection claim.[5]

Shaw does not argue that the *Tapia* plaintiffs had a conflict of interest with her or were in any other way hindered from protecting her equal protection interests during the jury selection process.[6] Absent such a showing, Judge Wilson's determination binds her just as it did the *Tapia* plaintiffs. *See Nevada v. United States*, 463 U.S.

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[5] We are not called upon in this case to decide whether a venireperson can bring a civil rights action on his or her own behalf if the litigant in the prior proceeding failed to raise a *Batson* objection to a peremptory challenge against the venireperson. The doctrine of issue preclusion bars litigation only of issues actually litigated and necessarily decided in a prior proceeding. However, under the doctrine of claim preclusion, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Our holding that a litigant acts as a venireperson's "virtual representative" when litigating a *Batson* claim is not determinative of the questions whether the litigant is the venireperson's privy when *failing* to pursue a *Batson* claim or whether the litigant can effectively waive the venireperson's individual claim.

[6] Indeed, Shaw is represented in this action by the same attorney who represented the plaintiffs in the *Tapia* litigation.

110, 134-44 (1983) (parties whose interests were represented by the United States in previous litigation were bound by the decree in that litigation).

Accordingly, the district court's dismissal of Shaw's action is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GINA V. SHAW, Plaintiff, v. JAMES KENNETH HAHN, et al., Defendants.	CV 93-7064 JSL **AMENDED** ORDER GRANTING DEFENDANT KENNETH HAHN'S MOTION TO DISMISS (Filed Feb. 22, 1994)

The previous order of this Court disposing of the Motion of defendant James Kenneth Hahn to dismiss is hereby amended, so that the order now shall read in its entirety as follows:

The Motion of defendant James Kenneth Hahn to dismiss came for hearing regularly on January 31, 1994.

Having reviewed the papers filed in connection with this matter, having heard oral argument, and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED that the motion of defendant James Kenneth Hahn to dismiss be GRANTED.

IT IS SO ORDERED.

DATED: 2/22/94

/s/ Spencer Letts
J. Spencer Letts
United States District Judge